FILED

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No. (1)

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

SANDRA B. and BARBARA W.,
Petitioners,

v.

CLIFFORD O'CONNOR, Acting Director of the Milwaukee County Department of Human Services, BRODERICK B., LODIE B. and KENNETH W.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF WISCONSIN
FOR THE FIRST APPELLATE DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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April 21, 1997

29 pp

QUESTIONS PRESENTED

(1) Whether the warrantless search of Petitioners' homes was in violation of the Fourth Amendment to the U.S. Constitution, where the searches were based merely upon referrals indicating that children were living in unclean conditions;

(2) Whether section 48.19(1)(d)5. of the Wisconsin Statutes, which provides for the summary removal of a child from its parent, violates the Fourth Amendment to the U.S. Constitution as applied in this case;

(3) Whether the issues raised on appeal are moot; and

(4) Whether Petitioners waived their right of appeal by not filing appropriate motions in the Children's Court proceedings.

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PETITION FOR A WRIT OF CERTIORARI

Sandra B. and Barbara W. respectfully petition for a writ of certiorari to review the judgments of the Court of Appeals of Wisconsin for the First Appellate District in this case.

OPINIONS BELOW

On February 7, 1995, Circuit Court Judge Thomas P. Doherty entered orders denying habeas corpus relief for Sandra B. and Barbara W. The orders are not reported and are reprinted in the appendix hereto (App., *infra*, pp.6-9).

The opinion and order of the Wisconsin Court of Appeals, dated July 29, 1996, summarily dismissing the appeals as moot, is not reported and is reprinted in the appendix hereto (App., *infra*, pp.2-5).

The order of the Wisconsin Supreme Court dated October 21, 1996, denying the petition for review, is not reported and is reprinted in the appendix hereto (App., *infra*, p.1).

JURISDICTION

The order of the Wisconsin Supreme Court denying the petition for review was entered on October 21, 1996.

This appeal is being docketed in this Court within 90 days from the order of the Wisconsin Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C., sec. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATE STATUTES

Fourth Amendment, United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 48.19(1)(d)5., Wisconsin Statutes Annotated:

> 48.19 Taking a child into custody
> (1) A child may be taken into custody under
> . . .
> (d) circumstances in which a law enforcement officer[1] believes on reasonable grounds that:
> . . .
> 5. The child is suffering from illness or injury or is in immediate danger from his or her surroundings and removal from those surroundings is necessary;

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1 Department social workers have the power of law enforcement officers for the purpose of taking a child into custody. Sec. 48.08(2), Stats.

STATEMENT OF THE CASE

In each of these cases state authorities responded to referrals indicating that children were living in unclean conditions.

A. Sandra B.

In the case of Sandra B. school officials reported that Broderick B. (Age 12 at the time) came to school with a terrible body odor. The alleged father confirmed that the mother's home was unclean. An unannounced visit to Sandra B.'s home was conducted by a social worker with the Milwaukee County Department of Human Services (the "Department"). Broderick, his sister Lodie (age thirteen), and some of their friends were present. The mother was not home, although she had been there earlier in the day.

The social worker proceeded to conduct a search of the home. She observed a general lack of food, generally unclean living conditions, and a leaking kitchen sink. The children were seized and placed into custody with the Department. No warrants had been obtained for purposes of searching the house or seizing the children.

B. Barbara W.

In the case of Barbara W. numerous police cars responded to a referral indicating that children were living in a filthy home environment. Upon their arrival a thorough search was made of the home, revealing generally unclean and unkempt conditions. Also discovered was a broken upstairs

toilet that would overflow if used, and a stove burner left lit.[2]

The home was owned by Ora S., mother of Barbara W. There were approximately 15 children living in the home, all related to Ora S. as grandchildren or great grandchildren. Thirteen children were ultimately detained, including three of Barbara W.'s children. No warrants had been obtained for purposes of searching the home or for seizing the children.

In both of these cases detention hearings were held in the Children's Court the day after the children were taken into custody. Petitions for habeas corpus relief were filed simultaneously by Sandra B. and Barbara W. after the detention hearings and prior to the time scheduled for their trials. Hearings on the petitions were held January 23 and 25, 1995. On February 7, 1995 Circuit Court Judge Thomas Doherty entered orders denying relief to either party and upholding the constitutionality of section 48.19(1)(d)5. of the Wisconsin Statutes.[3] [App., *infra,* pp.6-9].

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2 In its petition for protective placement the County also alleged the presence of "exposed wiring." This issue, however, has been contested by Barbara W.

3 Counsel for Petitioners raised search and seizure issues and challenged the constitutionality of sec. 48.19(1)(d)5., Stats. in the petitions for habeas corpus. [R.95-0465 doc.1; and R.95-0466 doc.1]. Judge Doherty ruled on these issues in court, [January 25, 1995 Trans., pp.28-32], and by written order. [App., *infra*, pp.6-9].

Subsequent to the habeas corpus proceedings Sandra B. stipulated to the jurisdiction of the Children's Court and agreed to the placement of her children with her sister in Mississippi. As Barbara W. failed to appear at her trial in the matter, a default judgment was entered against her. Her attempt to vacate the default judgment was unsuccessful. She ultimately stipulated to the placement of her children into foster care. Although Barbara W. stipulated to the terms of the dispositional order, she never stipulated to the jurisdiction of the Children's Court (contrary to the facts presented in the Court of Appeals' opinion and order).

The Wisconsin court of Appeals summarily dismissed the consolidated appeals based upon its determination that the cases were moot. [App., *infra*, pp.2-5]. The Wisconsin Supreme court denied review without comment. [App., *infra*, p.1].

REASONS FOR GRANTING THE PETITION

I. A WISCONSIN STATE COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

In its dismissal of the habeas corpus petition the Circuit Court held that the procedures used by the State to seize and detain Petitioners' children were not in violation of the Fourth Amendment to the U.S. Constitution. [App., *infra*, p.7].

Appellants are only able to find two federal

cases involving the protective placement of children in which Fourth Amendment issues are addressed by the court: (1) Donald v. Polk County, 836 F.2d 376 (7th Cir. 1988), and (2) Hurlman v. Rice, 927 F.2d 74 (2d Cir. 1991).[4]

In Donald v. Polk County a ten-year-old epileptic child was taken into custody at her school after an interview with the child indicated that she had been the victim of physical abuse. As there was no search of the child's home, Fourth Amendment issues were limited to whether the seizure was lawful. The court concluded that the seizure was lawful, as the seizing official made a finding of probable cause to believe that the child was at risk of immediate injury and a probable cause determination was made by a judicial officer promptly after the child was taken into custody.

The question not fully addressed by the court, however, is what constitutes risk of "immediate injury." Courts which have considered Fourteenth Amendment challenges to the seizure of a child have held that officials may remove a child from the custody of the parent without consent or a prior court order only in "emergency" circumstances. Hurlman, 927 F.2d at 80; Pauli v. Farmington Cent. Com. School Dist. 265, 841 F.Supp. 840, 846 (C.D.Ill. 1994). While it is probable that evidence of physical abuse would constitute an emergency justifying the summary seizure of a child, much less clear is the question of whether evidence of an unclean home,

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4 Most cases in this area involve challenges based upon substantive and procedural due process grounds.

standing alone, can justify such a seizure.

Hurlman v. Rice does not provide much added guidance in this regard. In Hurlman police officers forcibly entered a child's home and seized the child based upon (a) a family court order to show cause why the child's mother should not be enjoined from residing with him at the home of her parents, and (b) information that the child's grandfather had previously been convicted of an offense involving endangering the welfare of a child. Although the court's opinion provides some useful language regarding rights guaranteed by the Fourth Amendment, the case does not involve allegation of an unclean home, and the holding is limited to the specific question of whether the defendant police officers were entitled as a matter of law to dismissal of a section 1983 claim in a summary judgment motion. (The court held that they were not so entitled.)

Thus there are no federal cases which address the important federal question of whether a state official may conduct a warrantless search merely upon information that children are living in an unclean environment.

Furthermore, state statutes generally do not provide adequate guidance in this area. For one, statutes typically provide the conditions under which a child may be summarily seized and do not address searches of the home. Secondly, most state statutes, similarly to Wisconsin, allow the prehearing seizure of a child upon a finding of "immediate" or "imminent" danger, as opposed to language which clearly communicates to the

detaining officer that a true "emergency" must exist to justify summary removal of a child.[5]

This distinction is not insignificant. As noted by the Wisconsin Supreme Court in State v. Smith, 131 Wis. 2d 220, 388 N.W.2d 601 (1986), a rule which provides for an exception to the warrant requirement "should be one which can be easily understood and readily applied by well-intentioned and reasonably competent police officers." 229, 388 N.W.2d at 605. The court went on to adopt a rule requiring that before a police officer may make a warrantless arrest within the home, the officer must reasonably believe that "delay in procuring a warrant would *gravely endanger life* or risk destruction of evidence or greatly enhance the likelihood of the suspect's escape." *Id.* At 229-30, 388 N.W.2d at 605-06 (emphasis added).

Although the warrantless seizure of Barbara W.'s children may have been justified, the seizure of Sandra B.'s children was not justified. The social worker only observed a general lack of food, unclean living conditions, and a leaking kitchen sink. Although the mother was not at home, the children were twelve and thirteen years old--old enough to take care of themselves while the mother was momentarily out of the house. Section 48.19(1)(d)5. of the Wisconsin Statutes is therefore

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5 *See, eg.*,CAL. WELF. & INST. CODE, secs. 305(a) and 300(d) ("home is an unfit place"); F.S.A., sec. 39.401(1)(b) ("immediate danger"); 705 ILCS, secs. 405/2-5(1)(a) and 405/2-3(1)(b) ("environment is injurious to his or her welfare"); and N.Y. FAM. CT. ACT, sec. 1024 ("imminent danger").

unconstitutional, as it does not clearly communicate to the detaining official that an emergency condition must exist to justify the summary seizure of a child.

II. ISSUES PRESENTED FOR APPEAL ARE NOT MOOT.

In its summary dismissal of these cases the Wisconsin Court of Appeals determined that the issues raised by the appeals are moot, citing Petitioners' stipulation to the respective placement plans adopted by the Children's Court and their stipulation to the jurisdictional authority of the Children's Court. [App., *infra*, pp.2-5].

For one, the Court of Appeals is incorrect in stating that Barbara W. stipulated to the jurisdiction of the Children's Court. Although a default order was entered against her for failure to appear at trial, she soon thereafter requested (unsuccessfully) that the default order be vacated. Although she ultimately stipulated to the terms of the dispositional order, she never stipulated to the jurisdiction of the court. It was not the specific terms of the dispositional order that she contested, but rather it was the removal of the children from her custody and the circumstances surrounding the search of her home and the seizure of her children that she has always challenged and continues to challenge.

In the case of Sandra B., she did stipulate to the jurisdiction of the Children's Court. However, it is unfair to use this against her, for Sandra B. specifically conditioned her stipulation upon the understanding that it would not prejudice her pending appeal of the Circuit Court's earlier

decision denying habeas corpus relief.[6]

Even if these cases are moot, issues raised by the appeals should nonetheless be reviewed. Generally, moot issues will not be considered on appeal, but an exception is made if the issue has great public importance, if a statute's constitutionality is involved, or a decision is needed to guide the trial courts. State ex rel. Jones v. Gerhardstein, 135 Wis. 2d 161, 169, 416 N.W.2d 883 (Ct.App. 1986). As Petitioners challenge the constitutionality of sec. 48.19(1)(d)5., Stats., their cases clearly fall into the exception to the mootness rule.

The issues raised are also of great public importance. Is it not curious that there is an extensive body of law regarding search and seizure in the criminal context, but very little where there is the protective seizure of children? Are the rights of suspected criminals more important than the rights of parents suspected of child neglect? This attorney can personally attest, as an officer of the court, that he has represented parents, children and the State in CHIPS proceedings for the last five years and is not aware of a search or arrest warrant ever having been issued in any case.

It should be remembered that the Fourth Amendment is not intended to protect culpable persons, but rather is intended to protect innocent persons from needless intrusion into their privacy. We do not hear about the innocent victims, for

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6 Sandra B. cannot provide citation, as the Children's Court proceedings are not a part of the record in this case.

where the State enters a home and finds nothing, the illegal search will generally not come to the attention of the courts.

III. PETITIONERS HAVE NOT WAIVED THEIR RIGHT TO APPEAL.

In its summary disposition of these cases the Court of Appeals cited Petitioners' failure to file appropriate pre-trial motions, to seek suppression of evidence or to otherwise challenge the propriety of taking the children into custody (citing sec. 48.297(2)-(4), Stats.[7]). [App., *infra*, pp.4-5].

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7 Sec. 48.297(2)-(4), Stats. provides in pertinent part:

48.297 Motions before trial.

. . .

(2) Defenses and objections based on defects in the institution of proceedings, lack of probable cause on the face of the petition, insufficiency of the petition . . . or invalidity in whole or in part of the statute on which the petition . . . is founded shall be raised not later than 10 days after the plea hearing or be deemed waived. . . .

(3) Motions to suppress evidence as having been illegally seized or statements illegally obtained shall be made before fact-finding on the issues. . . .

(4) Although the taking of a child into custody is not an arrest, it shall be considered an arrest for the purpose of deciding motions which require a decision about the propriety of taking into custody, including but not limited to motions to suppress evidence as illegally seized, motions to suppress statements as illegally obtained and motions challenging the lawfulness of the taking into custody.

Although the Court of Appeals raises these issues while considering whether the appeals are moot, this is technically a separate issue concerning whether Petitioners have waived their right to appeal. Petitioners assert that the provisions of sec. 48.297(2)-(4), Stats. do not preclude them from bringing their appeal, as a habeas corpus proceeding is separate and distinct from proceedings in the Children's Court. Petitioners admit that it may have been more judicious to have raised Fourth Amendment issues in the Children's Court; however, they were nonetheless entitled to challenge the constitutionality of a Wisconsin Statute in a habeas corpus petition.[8]

There is some authority for the proposition that habeas corpus cannot be used to obtain post-conviction relief where issues were not properly raised at trial. *See* 39 C.J.S., *Habeas Corpus*, sec. 53 at 614-16. This proposition should not apply to the present cases, as both Barbara W. and Sandra B. filed their habeas corpus petitions well before entering into any stipulations.[9]

Both Barbara W. and Sandra B. clearly

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8 Whether habeas corpus is an appropriate remedy in this case is an issue that has been fully briefed upon appeal. As the Court of Appeals did not raise this issue in its summary dismissal, Petitioners will not presently address the issue.

9 The habeas corpus petitions were filed on December 7, 1994. Barbara W. stipulated to the form of the dispositional order on February 15, 1995. Sandra B. stipulated to the court's jurisdiction on April 3, 1995.

challenged the taking of their children into custody during the detention hearings. Barbara W. again challenged the seizures in a review hearing before the Children's Court. Having failed to obtain the release of their children through procedures provided by the Children's Court, Petitioners sought to challenge the constitutionality of the Wisconsin Statutes through the timely filing of a habeas corpus petition. The failure of Petitioners to subsequently raise constitutional objections in the Children's Court should not preclude them from seeking an appeal of the denial of their habeas corpus petition.

CONCLUSION

Review by the Supreme Court would help to define those situations where state officials may lawfully search a child's home without first obtaining a search warrant. Review would also clarify whether language contained in sec. 48.19(1)(d)5. of the Wisconsin Statutes, which provides for the summary seizure of a child, violates rights guaranteed by the Fourth Amendment to the U.S. Constitution.

Respectfully submitted,

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Dated this 21st day of April, 1997.

APPENDIX A

THE SUPREME COURT OF WISCONSIN

Filed October 21, 1996

Nos. 95-0465 State ex rel. Sandra B. v. O'Connor L.C.#95CV107 and 95-0466 State ex rel. Barbara W. v. O'Connor L.C.#95CV106

ENTRY

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of petitioners-appellants-petitioners, State of Wisconsin ex rel. Sandra B. and Barbara W., and considered by the court,

IT IS ORDERED that the petition for review is denied, without costs.

Marilyn L. Graves
Clerk of Supreme Court

APPENDIX B

THE COURT OF APPEALS OF WISCONSIN

FIRST APPELLATE DISTRICT

Filed July 29, 1996

95-0465	State ex rel. Sandra B. v. Clifford O'Connor, Acting Director of the Milwaukee County Department of Human Services, Broderick B. and Lodie B. (L.C. #95-CV-000107)
96-0466	State ex rel. Barbara W. v. Clifford O'Connor, Acting Director of the Milwaukee County Department of Human Services, and Kenneth W. (L.C. #95-CV-000106)

ENTRY

Before Sullivan, Fine and Schudson, JJ.

Barbara W. and Sandra B. Appeal[1] from circuit court orders denying their respective petitions for *habeas corpus* relief. Their petitions objected to the

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1 These appeals were consolidated on July 17, 1995.

constitutionality of the "searches" and "seizures" that occurred when their children were initially taken into custody by the Milwaukee County Department of Human Services (MCDHS). Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* RULE 809.21, STATS. Because each of the appellants agreed to the current placement of their children, we conclude that the issues raised by these appeals are moot.

The dispositive facts underlying these appeals are undisputed. On October 16, 1994, police were dispatched to Barbara W.'s home and her children were taken into emergency detention. A CHIPS petition was filed on October 19, 1994. Barbara W. appeared by counsel at the dispositional hearing on March 29, 1995 and stipulated to the children's court's jurisdiction and the dispositional order placing the children in a foster home in Milwaukee County. Barbara W. did not interpose any constitutional objections to the proceedings or appeal from the dispositional order.

MCDHS became aware of Sandra B.'s children pursuant to a protective service referral made at school. A CHIPS petition was filed on November 2, 1994. On April 3, 1995, Sandra B. submitted to the jurisdiction of the court and stipulated to a dispositional order transferring the legal custody of her children, Broderick B. and Lodie B., to MCDHS and placing the children with their aunt in Mississippi. Like Barbara W., Sandra B. did not object to the proceedings or appeal from the circuit court's dispositional order.

The appellants filed their respective petitions for *habeas* relief with the court of appeals on December 7, 1994. This court transferred the petitions to the circuit court on December 21, 1994. Following hearings held on January 23 and 25, 1995, the trial court entered its orders denying the petitions on February 7, 1995. These appeals followed.

A *habeas* writ is available to test a child's confinement under a court order. *J.V. v. Barron,* 112 Wis. 2d 256, 260, 332 N.W.2d 796, 799 (1983). In such a circumstance, "the habeas court determines only whether the order is void because the court issuing the order lacked jurisdiction to do so, the order was made in violation of the constitution, or there was a lack of legal authority for the order." *Id.* at 261, 332 N.W.2d at 799.

As the record amply demonstrates, the petitioners stipulated to the respective placement plans adopted by the children's court in its dispositional orders as well as to the jurisdictional prerequisites to the court's exercise of authority over their children. The record shows that the disposition of the children's custody was uncontested. The petitioners elected not to file any pre-trial motions to raise defenses based on any alleged defects in the initiation of the proceedings or lack of probable cause, and they elected not to seek the suppression of evidence or to challenge the propriety of taking the children into custody. *See* sec. 48.297(2)-(4), STATS.

By electing not to take these actions in the underlying children's court proceedings, Barbara W.

and Sandra B. demonstrated their assent not only to the dispositional orders entered but also to the process by which the dispositional orders were reached. Because the controversy of the children's placement and custody was settled by the stipulation of these petitioners and without their challenge to the initiation of the CHIPS's proceedings, the instant appeals are moot. *See Racine v. J-T Enters. Of Am., Inc.,* 64 Wis. 2d 691, 700, 221 N.W.2d 869, 874 (1974) (a matter is moot if a determination is sought which cannot have a practical effect on the alleged controversy).

Upon the foregoing reasons,

IT IS ORDERED that these appeals are summarily dismissed as moot pursuant to RULE 809.21, STATS.

Marilyn L. Graves
Clerk of Court of Appeals

APPENDIX C

CIRCUIT COURT OF
MILWAUKEE COUNTY, WISCONSIN

THOMAS P. DOHERTY, JUDGE

Barbara W. v. Clifford O'Connor
Case No. 95-CV-000106

Filed February 7, 1995

ORDER DENYING THE
WRIT OF HABEAS CORPUS

Hearings having been held on January 23 and 25 to consider a petition for the writ of habeas corpus to release the children of petitioner, and

Appearances having been made by Barbara W., her attorney Donald Linke, Attorney Mary Moore on behalf of the children, Assistant Corporation Counsel John Jorgensen on behalf of the Defendant, and Assistant District Attorney Linda Johnson, and

The court having considered the petition, the memorandum in support thereof, and oral argument by counsel,

The Court makes the following FINDINGS OF FACT AND CONCLUSIONS OF LAW:

(1) The petitioner is without standing to bring the habeas corpus petition. Neither the mother nor the children have signed the petition; the mother is not presently being detained; the children are adequately represented by counsel; and the petitioner has not presented evidence concerning the will of the children.

(2) Habeas corpus is not an appropriate proceeding in which to address allegations of an illegal search and seizure.

(3) Petitioner has failed to provide a complete record of the proceedings in Children's Court and the evidence presented therein.

(4) Petitioner has not adequately challenged the constitutionality of procedures provided by Chapter 48. Furthermore, petitioner has failed to raise these constitutional issues in the Children's Court.

(5) [struck by the court]

(6) Even if the writ of habeas corpus were granted, there is no guarantee that the children would be returned to their mother, as the best interest of the children are paramount.

IT IS THEREFORE ORDERED AND ADJUDGED that the writ of habeas corpus shall be denied, that temporary physical custody shall remain with the Milwaukee County Department of Human Services, and that all orders heretofore made by the Milwaukee County Children's Court

shall remain unaffected and intact.

Dated this ____ day of Feb 07 1995, 1995.

BY THE COURT:

/s/ Thomas P. Doherty
Thomas P. Doherty
Circuit Court Judge

APPENDIX D

THE CIRCUIT COURT OF
MILWAUKEE COUNTY, WISCONSIN

THOMAS P. DOHERTY, JUDGE

Sandra B. v. Clifford O'Connor
Case No. 95-CV-000107

Filed February 7, 1995

ORDER DENYING THE WRIT
OF HABEAS CORPUS

[Same as for Barbara W.]

Thomas P. Doherty
Circuit Court Judge